APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-2485

[Filed March 26, 2007]

Mindy Kahle, Appellee	)
v.	)
Jermaine Leonard, individually and in his official capacity,	)
Sheriff Don Holloway, individually and in his official capacity, et al	)
and	)
Deputy Tim Malone, individually, Appellant	)

Appeal from U.S. District Court
for the District of South Dakota
(5:04-cv-05024-KES)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 26, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-2485

[Filed February 12, 2007]

Mindy Kahle,
Appellee

v.

Jermaine Leonard, individually and in his official capacity,

Sheriff Don Holloway, individually and in his official capacity, et al.,

and

Deputy Tim Malone, individually,
Appellant

Appeal from U.S. District Court
for the District of South Dakota
(5:04-cv-05024-KES)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 12, 2007

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-2485

[Filed February 12, 2007]

Mindy Kahle,	)
Plaintiff/Appellee,	)
	)
v.	)
	)
Jermaine Leonard, individually and in his official capacity,	)
Defendant;	)
	)
Deputy Tim Malone, individually and in his official capacity,	)
Defendant/Appellant;	)
	)
Sheriff Don Holloway, individually and in his official capacity; Pennington County Sheriff's Office; Pennington County Jail; Scott Schuft, individually and in his official capacity,	)
Defendants	)
	)

Appeal from the United States District Court
for the District of South Dakota

Before LOKEN, Chief Judge, MELLOY, Circuit Judge, and SCHILTZ,[1] District Judge.

SCHILTZ, District Judge.

Deputy Tim Malone appeals from the denial of his motion for summary judgment in Mindy Kahle's 42 U.S.C. § 1983 action. Kahle alleges that Malone violated her constitutional rights while she was detained at the Pennington County Jail in Rapid City, South Dakota. Specifically, Kahle alleges that Malone, a supervisor at the Jail, was deliberately indifferent to a substantial risk that she would be sexually assaulted by correctional officer Jermaine Leonard. Malone moved for summary judgment on the ground of qualified immunity. The district court[2] denied Malone's motion, holding that, if a jury accepts Kahle's version of the events, Malone will not be protected by qualified immunity. We affirm.

I. Background[3]

Leonard applied for a correctional officer position with the Jail in August 2002. After conducting a background check, the Jail hired Leonard, and he began an eight-week training program in November 2002. He was scheduled for two weeks

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[1] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota, sitting by designation.

[2] The Honorable Karen E. Schreier, Chief Judge, United States District Court for the District of South Dakota.

[3] The parties dispute many of the facts. We must assume, for purposes of this appeal, that Kahle's version of the facts is true. *See Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 928 n.2 (8th Cir. 2006).

of classroom study and six weeks of supervised, on-the-job training.

The events giving rise to Kahle's lawsuit occurred on the evening of December 14, 2002, while Kahle was being held at the Jail, and while Leonard was still completing his on-the-job training. Malone, a senior correctional officer, was asked to supervise Leonard that evening. As the supervisor, Malone was supposed to observe Leonard closely and ensure that Leonard did not act improperly.

At 10:00 p.m. each night, the cells in the Jail were locked down and the lights turned off. Jail policy recognized that the entry of a correctional officer into a cell after lockdown was an unusual and (literally) noteworthy event. The Jail required that, if a cell door was opened after lockdown for any reason, that event had to be noted in the shift log. As the supervisor on duty on December 14, Malone was responsible for ensuring the accuracy of the shift log.

Kahle's cell was located on the upper level of cell block 5. Between 10:00 and 11:00 p.m. on December 14, Leonard entered Kahle's cell three times. The first time Leonard kissed Kahle and tried to pull down her pants. The second time Leonard kissed Kahle, pulled down her pants, and performed oral sex on her. When Kahle resisted, Leonard slammed her against the wall, which inadvertently set off his CB radio. As he was leaving the cell after assaulting Kahle, Leonard asked if he could take some drawings that Kahle possessed, and Kahle consented. The third time Leonard returned the drawings, then kissed Kahle and rubbed his genitals against hers. The first visit lasted approximately three minutes, and the second at least five minutes. It is unclear how long the third visit lasted.

During the hour that Leonard repeatedly entered Kahle's cell and sexually assaulted her, Malone was sitting at the work station in cell block 5. Leonard told Malone each time that he went up to Kahle's cell. After Leonard's second visit to Kahle's cell, Leonard returned to the work station, showed Kahle's drawings to Malone, and told Malone that he was going to trace one of the drawings (apparently a heart encircled by a rose) and then return the drawings to Kahle. Malone voiced no concern, despite the fact that Leonard was an untested trainee and Malone was his supervisor.

The fact that Leonard told Malone three times that he was going up to Kahle's cell—and the fact that Malone knew that Leonard first received drawings from Kahle and then returned them—does not necessarily mean that Malone knew that Leonard was entering Kahle's cell. Leonard and Kahle could have been talking and passing the drawings back and forth without opening her cell door. But the work station at which Malone was sitting had a panel of lights, with each light indicating whether a cell door was locked or unlocked. Each of the three times that Leonard unlocked the door to enter Kahle's cell, a light on the panel would have switched from green (locked) to red (unlocked) and stayed red until the door was locked again. For example, during Leonard's second visit to Kahle's cell, a red light would have been illuminated for more than five minutes. Yet Malone claims that at no time between 10:00 and 11:00 p.m. did he notice a red light on a panel of green lights just a couple of feet in front of his face.

Malone also claims that, from where he was seated, it was impossible for him to observe Kahle's cell. Kahle testified, however, that she saw Malone look up during Leonard's second visit to her cell—the visit during which Leonard's CB radio was accidentally set off. Leonard also testified that, although he does not know what Malone saw, he would be

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surprised if Malone did not see him kissing Kahle. And Pennington County Sheriff Don Holloway, who was originally a defendant in this case, testified that "Correctional Officer Malone is wrong. You can see into those cells [from the work station]." Appellee's App. 32.

As noted, Malone was required to keep a written record of each time an inmate's door was opened after lockdown. He did not record any of Leonard's three visits to Kahle's cell. Of course, Malone's explanation is that, although a trainee that he was supervising went to the cell of a female detainee three times during the first hour of lockdown, Malone did not so much as glance up at her cell door—or glance down at the panel of lights—to ensure that the trainee did not enter her cell.

Malone moved for summary judgment in the district court, arguing that he is shielded from liability for his actions by qualified immunity. The district court rejected Malone's argument, holding that there is a question of fact concerning whether Malone violated Kahle's clearly-established constitutional rights by demonstrating deliberate indifference to a substantial risk that she would be sexually assaulted by Leonard. Malone filed this appeal.

II. Analysis

A. Jurisdiction

Ordinarily, appellate courts lack jurisdiction to review a denial of summary judgment. *See Johnson v. Jones*, 515 U.S. 304, 309, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). There is an exception to this rule when a district court denies a summary-judgment motion that is based on the defense of qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511,

530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Qualified immunity protects state actors from civil liability when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005). When a district court denies a defendant's motion for summary judgment based on qualified immunity, the defendant may immediately appeal the "purely legal" issue of "whether the facts alleged . . . support a claim of violation of clearly established law." *Mitchell*, 472 U.S. at 528 n.9. In this type of interlocutory appeal, jurisdiction does not extend to issues of "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Johnson*, 515 U.S. at 313. Put another way, "if the issues relate to whether the actor actually committed the act of which he is accused . . . we have no jurisdiction to review them in an interlocutory appeal." *Miller v. Schoenen*, 75 F.3d 1305, 1309 (8th Cir. 1996).

Kahle argues that this Court lacks jurisdiction over Malone's appeal because the district court found that there were factual issues concerning whether Malone acted with deliberate indifference. But "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, . . . and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable." *Behrens v. Pelletier*, 516 U.S. 299, 312-13, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). Although there is no interlocutory appellate jurisdiction to decide whether a particular defendant actually engaged in the conduct alleged,

> [b]y way of example, whether an inmate has alleged sufficient facts to allow a jury to conclude that the inmate faces a risk of assault from other inmates,

> prison officials know of the risk, and the reasonableness of their actions in light of a known risk are all reviewable in an appeal of a denial of qualified immunity at the summary-judgment stage.

Miller, 75 F.3d at 1308.

On this appeal from the order denying Malone's motion for summary judgment, we do not have jurisdiction to decide, for example, whether there is sufficient evidence for a jury to find that Kahle did not consent to the sexual contact with Leonard. But we do have jurisdiction to decide whether, assuming that all of the facts alleged by Kahle are true, Malone is entitled to qualified immunity as a matter of law. *See Miller*, 75 F.3d at 1309 ("The question of what was known to a person who might be shielded by qualified immunity is reviewable, to determine if the known facts would inform a reasonable actor that his actions violate an established legal standard."); *see also Henderson v. Munn*, 439 F.3d 497, 501 (8th Cir. 2006) (citing *Miller*). We now turn to that question.

B. The Merits

We review de novo a district court's denial of a motion for summary judgment on grounds of qualified immunity. *See Pagels v. Morrison*, 335 F.3d 736, 739 (8th Cir. 2003). Determining whether a state actor is entitled to qualified immunity involves two questions: First, did the official deprive the plaintiff of a constitutional or statutory right? If not, he does not need qualified immunity, as he is not liable under § 1983. If so, we ask the second question: Was that right so clearly established at the time that a reasonable official would have understood that his conduct was unlawful under the circumstances? *See Saucier v. Katz*, 533 U.S. 194,

201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). If the right was not clearly established, then the officer is protected by qualified immunity.

1. Liability under § 1983

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. "[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993). These conditions include measures taken to guarantee the safety of inmates. *See Farmer v. Brennan*, 511 U.S. 825, 832-33, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). Because Kahle was a pretrial detainee at the time of the alleged violation, her § 1983 claim is not analyzed under the Eighth Amendment, but instead under the Fourteenth Amendment's Due Process Clause. *See Owens v. Scott County Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003). This makes little difference as a practical matter, though: Pretrial detainees are entitled to the same protection under the Fourteenth Amendment as imprisoned convicts receive under the Eighth Amendment. *See Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006).

A prison official may be held liable to a detainee if he directly participated in the violation of her constitutional rights or if his failure to train or supervise the offending actor caused the violation. *See Tilson v. Forrest City Police Dep't*, 28 F.3d 802, 806-07 (8th Cir. 1994). A failure-to-supervise claim may be maintained only if the official "demonstrated deliberate indifference or tacit authorization of the offensive acts." *Liebe v. Norton*, 157 F.3d 574, 579 (8th Cir. 1998) (citation and quotations omitted). The deliberate-indifference standard is a subjective one: "[T]he official must both be

aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. The official need not believe that serious harm will actually befall an inmate; it is sufficient that the official knows of a substantial risk that the inmate will suffer serious harm. *Id.* at 842.

Malone does not dispute that sexual assault is a serious harm. *See id.* at 833 ("gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e]'") (quoting *Hudson v. Palmer*, 468 U.S. 517, 548, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)). Thus, if there was a substantial risk that Kahle would suffer that harm, and if Malone was deliberately indifferent to that risk, then Malone can be held liable under § 1983 for violating Kahle's rights under the Fourteenth Amendment (unless Malone enjoys qualified immunity).

Malone argues that he did not violate Kahle's rights because he was not subjectively aware that she was, in fact, being sexually assaulted. Malone misunderstands the deliberate-indifference standard. To be deliberately indifferent, Malone did not have to know that Kahle was being sexually assaulted, but only that she was at substantial *risk* of being sexually assaulted. The Supreme Court has been clear on this point:

> [A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

Id. at 842. This Court has been equally clear:

> [I]n order to have a viable deliberate indifference claim, a plaintiff is *not* required to allege and prove that the defendant . . . specifically knew about or anticipated the precise source of the harm.

Krein, 309 F.3d at 491.

In the face of this authority to the contrary, Malone cites a recent decision of this court—*Spann v. Roper*, 453 F.3d 1007 (8th Cir. 2006) (per curiam)—for the proposition that "if the supervisor is not the perpetrator, the law requires that the supervisor know about the perpetrator's misconduct and in some way acquiesce in that conduct." Appellant's Br. 21. But *Spann* does not say that. Indeed, the only language in *Spann* that comes close to saying that is in a parenthetical that describes another case on which Malone relies, *Ottman v. City of Independence*, 341 F.3d 751 (8th Cir. 2003). In *Ottman*, a brief paragraph that summarizes the law regarding supervisory liability ends by quoting a prior Eighth Circuit decision's quotation of a sentence from a Seventh Circuit opinion:

> "The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he or she] might see." *Ripson v. Alles*, 21 F.3d 805, 809 (8th Cir. 1994) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988)).

Id. at 761. Malone relies primarily on this sentence.

A close reading of *Spann*, *Ottman*, *Ripson*, and *Jones* reveals that none supports Malone's assertion that a supervisor cannot be held liable under § 1983 unless he was subjectively aware of the actual harm that the plaintiff

experienced. Even the sentence from *Jones* that is quoted in *Ripson* and again in *Ottman* suggests otherwise. The "conduct" to which that sentence refers must be the conduct that gives rise to the *risk* of a constitutional violation, because a supervisor cannot both "know" of a constitutional violation and "turn a blind eye for fear" that he "might see" a constitutional violation. The sentence becomes even clearer when read in conjunction with the sentence that immediately follows it in the *Jones* opinion: "They must in other words act *either* knowingly *or* with deliberate, reckless indifference." 856 F.2d at 992-93 (emphasis added). Thus, *Jones* itself makes clear that a supervisor can act with "deliberate, reckless indifference" even when he does not act "knowingly." The quotation of *Jones* in rather casual dicta in *Ottman* and *Ripson*—and the terse summary of *Ottman* in a parenthetical in *Spann*—were not meant to call into question the consistent holdings of the Supreme Court and this Court that a supervisor can be found liable under § 1983 for deliberate indifference if he is aware of "a substantial risk of serious harm," even if he is not aware that the harm has, in fact, occurred. *Farmer*, 511 U.S. at 842.

We agree with the district court that, if the jury accepted Kahle's version of the facts, the jury could find that Malone was aware of a substantial risk of serious harm to Kahle and exhibited deliberate indifference to that risk. Malone conceded, at his deposition, that no one is supposed to go into an inmate's cell after lockdown. Yet he knew that Leonard, a trainee with barely a month's experience working at the Jail (and therefore not someone whom Malone would have any reason to trust), went to a female detainee's cell three times after lockdown within the space of an hour. On at least one of those occasions, Leonard stayed in her cell for at least five minutes.

Malone denies that he noticed the lights on the indicator panel changing color. It is difficult to know whether his cause will be hurt more if the jury believes him or disbelieves him. If the jury disbelieves him, the jury may conclude that Malone has lied under oath, that Malone saw the red light indicating that Leonard had entered Kahle's cell three times for no legitimate reason and stayed once for over five minutes, and that Malone did absolutely nothing about it. The jury could find deliberate indifference under those circumstances. If the jury does not believe Malone, the jury may conclude that, despite being told three times in the space of an hour that a trainee was going to the cell of a female detainee, Malone cared so little about the safety of that detainee that he did not even glance at the panel of lights in front of his face. The jury could find deliberate indifference under those circumstances as well.

A similar point can be made about Malone's testimony that he could not see Kahle's cell. If the jury believes him, then the jury may well conclude that Malone's failure to glance at the panel of lights was even more egregious, as it was the only means he had for ensuring that Leonard was not entering Kahle's cell. If the jury disbelieves him—and credits instead Sheriff Holloway's testimony that the cell door was visible and Kahle's testimony that Malone looked up and saw Leonard standing near the open door of her cell—then the jury may conclude that Malone has lied under oath and covered up Leonard's conduct by failing to record it in the shift log. Again, these conclusions may lead the jury to find deliberate indifference.

It is true, as Malone argues, that he cannot be charged with inferences that he did not actually draw. But the Supreme Court has explained that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact

that the risk was obvious." *Farmer*, 511 U.S. at 842. On this record, a reasonable jury could conclude that Malone was aware of a substantial risk of serious harm to Kahle and that he exhibited deliberate indifference to that risk.

2. Qualified Immunity

The second question in the qualified-immunity analysis requires us to consider whether the right that Malone allegedly violated was clearly established at the time of the violation. It is not enough that the right be established in an abstract sense. *See Saucier*, 533 U.S. at 201. For example, it is not enough that the right of detainees to be free from cruel and unusual punishment be clearly established as of December 14, 2002. At a high enough level of abstraction, every constitutional right is clearly established. Rather, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In other words, Kahle must demonstrate that, on December 14, 2002, a reasonable prison official in Malone's position would have known that exhibiting deliberate indifference to a substantial risk that Leonard would sexually assault Kahle was unlawful. *See Sparr v. Ward*, 306 F.3d 589, 593 (8th Cir. 2002) ("Qualified immunity is an affirmative defense for which the defendant carries the burden of proof. The plaintiff, however, must demonstrate that the law is clearly established.").

We have no difficulty in concluding that Kahle has met her burden:

First, it has long been established in this Circuit and elsewhere that "[a] prison official may be held liable under the Eighth Amendment if he or she knows that an inmate

faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Coleman v. Rahija*, 114 F.3d 778, 785 (8th Cir. 1997); *see also Farmer*, 511 U.S. at 847 ("[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."); *Massick v. N. Cent. Corr. Facility*, 136 F.3d 580, 581 (8th Cir. 1998) ("The legal standard requires a plaintiff to show that defendants knew that he faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. See *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Certainly the right, thus abstractly stated, was clearly established." (parallel citations omitted)).

Second, no reasonable prison official in Malone's position could have concluded on December 14, 2002, that a detainee who was sexually assaulted by a prison guard did not suffer a "serious harm." The Ninth Circuit put the point well in 2000:

> In the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of this alleged assault, and no reasonable prison guard could possibly have believed otherwise.

Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (upholding denial of prison guard's motion for summary judgment on the basis of qualified immunity). Courts have held on multiple occasions—both before and after December 14, 2002—that the sexual assault of an inmate by a guard violates the inmate's constitutional rights. *See Williams v. Prudden*, 67 Fed. Appx. 976, 977 (8th Cir. 2003) (per

curiam) (holding that an inmate "sufficiently stated an Eighth Amendment claim by alleging that [the guard] forcibly ground his pelvis against her, grabbed her breast, verbally demanded sexual favors, made physical sexual advances, and attempted to force himself upon her"); *Berryhill v. Schriro*, 137 F.3d 1073, 1076 (8th Cir. 1998) ("Certainly, sexual or other assaults [by civilian prison employees] are not a legitimate part of a prisoner's punishment, and the substantial physical and emotional harm suffered by a victim of such abuse are compensable injuries."); *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998) ("Clearly [inmates'] deprivations resulting from the sexual assaults [by a prison guard] are sufficiently serious to constitute a violation under the Eighth Amendment."); *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) ("We agree with Ms. Hovater that an inmate has a constitutional right to be secure in her bodily integrity and free from [sexual] attack by prison guards.").

Thus, as of December 14, 2002, it was clearly established that a prison official could be held liable under § 1983 for exhibiting deliberate indifference to a substantial risk that a detainee would be sexually assaulted by a guard. Several judicial opinions had said so directly. *See, e.g., Daskalea v. Dist. of Columbia*, 343 U.S. App. D.C. 261, 227 F.3d 433, 442 (D.C. Cir. 2000) (upholding jury verdict against District for supervisors' deliberate indifference to sexual abuse of female prisoner by guards); *Barney*, 143 F.3d at 1310 (acknowledging that prison officials could be liable for deliberate indifference to the risk of guard-on-inmate sexual assault, but finding no liability under the facts of the case); *Hovater*, 1 F.3d at 1066 (applying deliberate-indifference standard to failure-to-supervise claim in case involving rape of inmate by guard). And these opinions are reinforced by other opinions holding that a prison official can be held liable for deliberate indifference to a substantial risk that one *inmate*

will sexually assault another. *See, e.g., Vosburg v. Solem*, 845 F.2d 763, 765-67 (8th Cir. 1988) (upholding a jury's verdict finding prison officials liable for deliberate indifference to rape of inmate); *Velez v. Johnson*, 395 F.3d 732, 736 (7th Cir. 2005) ("There can be no debate that this right [to be free from deliberate indifference to rape and assault] was clearly established"); *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 63-64, 66 (1st Cir. 2002) (holding that inmate's allegation of rape was sufficient to state a due process claim).

Without question, then, Kahle's constitutional right to be protected from being sexually assaulted by a guard was clearly established on December 14, 2002, as was the fact that a supervisor who was deliberately indifferent to a substantial risk of such an assault could be held liable under § 1983. "[I]t would be clear to a reasonable officer [in Malone's position] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.

Because a reasonable juror who accepted Kahle's version of the events could conclude that Malone violated Kahle's clearly-established constitutional rights by demonstrating deliberate indifference to a substantial risk that she would be seriously harmed by Leonard, the district court's denial of Malone's summary-judgment motion is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA,
WESTERN DIVISION

No. CIV. 04-5024-KES

[Filed May 26, 2006]

MINDY KAHLE,
Plaintiff,

v.

JERMAINE LEONARD, individually and in his official capacity; DEPUTY TIM MALONE, individually and in his individual capacity; SHERIFF DON HOLLOWAY, individually and in his official capacity; PENNINGTON COUNTY SHERIFF'S OFFICE: and PENNINGTON COUNTY JAIL,
Defendants.

KAREN E. SCHREIER, CHIEF JUDGE

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, TO DISMISS, AND FOR PARTIAL JUDGMENT ON THE PLEADINGS

Plaintiff, Mindy Kahle, filed a complaint against Jermaine Leonard, Deputy Tim Malone, Sheriff Don Holloway, Pennington County Jail Supervisor Scott Schuft, the Pennington County Sheriff's Department (PCSD), and the Pennington County Jail (Jail). The complaint alleges multiple causes of action against defendants, including claims under 42 U.S.C. § 1983 and pendent state law claims. Defendants have moved for summary judgment, and Leonard has moved to dismiss and for partial judgment on the pleadings. Kahle opposes the motions.

BACKGROUND

The evidence, viewed in the light most favorable to the nonmoving party, Kahle, is:

Kahle was arrested on September 11, 2002. On December 14, 2002, she was incarcerated at the Jail. (DSUMF ¶¶ 1-2).

On August 8, 2002, Leonard applied for employment as a corrections officer (CO) with the Jail. Pennington County followed its system of hiring, which included a background check by a contract provider, a criminal history check, a credit history check, a psychological evaluation by a licensed psychologist, and interviews by the Pennington County Sheriff's Office (DSUMF ¶ 7). The background check revealed Leonard had been a CO in Texas. (*Id.* ¶ 9). Three members of the senior jail staff conducted Leonard's initial interview, the purpose of which was to screen applicants for their ability to "problem solve." (*Id.* ¶ 11).

Leonard was hired as a CO and began an eight-week training program on November 6, 2002. (*Id.* ¶ 24; PSMF ¶ 5). Leonard's planned training included two weeks in the classroom and six weeks of supervised, hands-on training on

the cellblock. (*Id.* ¶ 25). In the classroom, Leonard received instruction on ethics, con-games, cellblock observation, staff/inmate communications, and cross-gender supervision. (DSUMF ¶ 26).[1] During Leonard's training, a discussion took place regarding a prior incident of sexual misconduct at the Jail. Leonard participated in the discussion, and afterward, his training officer, Sergeant Trent Fliginger, believed Leonard clearly understood that the prior incident of sexual misconduct at the Jail was a violation of jail policy and state law, and there were legal consequences for such action. (Docket 52 ¶ 7S). There were no complaints or other indications during Leonard's training that showed he posed a risk to inmates or would require additional or different supervision. (DSUMF ¶ 46).[2] Neither Holloway, the Pennington County Sheriff who is responsible for the Jail (Docket 81-Holloway Dep., Vol I, at 4:11-5:11), nor Schuft, the Pennington County Jail

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[1] In her objections to the County Defendants' Statement of Undisputed Material Facts, Kahle denies that Leonard was trained on cross-gender supervision, arguing that Leonard only stated he watched videos entitled "Con-Game, Hostage Incidents, Perimeter Cont. Room Sec./Contraband Control, and Emergency Procedures (fire safety)." (Docket 77 ¶ 26). However, in their statement of facts, the County Defendants state only that Leonard was trained in "cross-gender supervision" (DSUMF ¶ 26). Indeed, Leonard's training schedule shows he was trained on "Cross Gender Supervision" on November 12, 2002 (Docket 49 at 181), and Kahle presents no evidence to rebut this fact. To the extent these defendants claim Leonard watched a video on "cross-gender supervision," the court must view the evidence in the light most favorable to Kahle and assume Leonard did not watch the video.

[2] Kahle denies this statement by asserting "Leonard lied on his application when he represented that he graduated from Angelina College Police Academy." Docket 77 ¶ 46.

Commander, were personally involved in Leonard's training. (DSUMF ¶ 29; Docket 51 ¶ 1).[3]

On December 14, 2002, Fliginger, Leonard's field training officer (FTO), was not on duty. (*Id.* ¶ 38). Malone, a senior CO with three years' experience working on all cellblocks, including booking and the maximum security cellblocks, was selected to supervise Leonard. (*Id.* ¶¶ 38, 47-48). Fliginger asked Malone to fill in as an FTO, and Malone agreed. (*Id.* ¶ 49). Malone was reacquainted with the Daily Observation Reports (DOR) form and the FTO program. Malone was encouraged to ask questions of Fliginger or other FTOs. (*Id.*).

Between 10 and 11 p.m. on December 14, 2002, Leonard entered Kahle's cell three times. (DSUMF ¶ 79). The first time he entered, he kissed her and tried to pull down her pants. (*Id.*). The second time, he kissed her and kept trying to pull down her pants, then performed oral sex on her. (*Id.*). The third time, he kissed her and rubbed his private area on her private area. (*Id.*). Leonard informed Malone every time Leonard went into Kahle's cell. (Docket 81-Leonard Dep. at 175:24-176:2).

While Leonard was in the cell, Malone was sitting at the work station in cell block 5 filling out an evaluation report on Leonard. (PSMF ¶ 25). The work station has a panel of lights to indicate whether cell doors are locked or unlocked. (*Id.*;

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[3] Kahle denies this statement, citing the Holloway and Schuft depositions, which show Holloway is the sheriff and is in charge of the Jail, and Schuft is the jail administrator in charge of setting up training for recruits. These facts do not rebut the statement that the two were not involved directly in Leonard's training.

Docket 81-Malone Dep. at 63:21-64:1; Docket 84 ¶ 25). The panel light for Kahle's cell would have switched from green (locked) to red (unlocked) at least twice as Leonard entered and left Kahle's cell. (Docket 81-Malone Dep. at 65:9-23). Malone did not notice the lights changing and did not observe what occurred on the upper level of the cell block, where Kahle's cell was located. (Docket 81-Malone Dep. at 60:10-13, 65:24-66:2; PSMF ¶ 8). Kahle testified in her deposition that she saw Malone look up when Leonard was at Kahle's cell. (Docket 81-Kahle Dep. at 37:13-16, 121:8-13).

After an accusation was made against Leonard, the matter was referred to the PCSD for investigation. (*Id.* ¶ 71). Kahle also filed several inmate requests regarding the incident. (Docket 81, Ex. 9). The investigation revealed information to substantiate the accusations, and Leonard's employment was terminated. (*Id.* ¶¶ 67, 71). Leonard later pleaded guilty to criminal charges of sexual contact and served a sentence in jail. (Docket 81-Leonard Dep. at 64:7-65:5, 169:5-8).

The Pennington County Jail Inmate Handbook contains the Jail's mission statement, which states, "The operating philosophy of the Pennington County Jail provides for community safety, facility safety, and the welfare of staff and inmates in the most efficient manner possible." This mission statement is meant to provide safety for inmates and protect them from improper actions by guards. The handbook directs guards to protect inmates against physical, emotional, and psychological abuse or harassment. The protection would include situations in which a guard was having inappropriate contact with an inmate. (DSUMF ¶ 64). Policy 340.06 of the Pennington County Jail Policies and Procedures Manual, a copy of which each new Jail employee receives (*Id.* ¶ 44; Docket 49-5 at 166:14-167:20), states that Jail staff will follow procedures "to ensure that inmates are protected from

personal abuse, corporal punishment, personal injury, disease, property damage or harassment." (*Id.* ¶ 68; Docket 49-4 at 4). Leonard knew he was not supposed to open Kahle's cell door after lockdown, go into Kahle's cell, or engage in sexual contact with her. (PSMF ¶¶ 38, 47). Leonard's contact with Kahle was in direct violation of the Pennington County Jail Policies. (*Id.* ¶ 69).

Before the incident involving Leonard and Kahle, in October 2002, inmates Brenda Kinstad and Teresa Crawford claimed CO Jerome Morris was making sexual remarks to female inmates and peering into Kahle's cell. (*Id.* ¶ 90). Schuft recommended counseling for the officer. (*Id.*). In 1999, CO Donovan sexually assaulted a female inmate. (*Id.* ¶ 91). Donovan was terminated, and he was criminally charged for the assault. (DSUMF ¶ 43 Docket 84 ¶ 94). In August 1999, CO Monique Newcomb questioned inmate Jovan Two Dogs about her sexual orientation and stated she found Two Dogs attractive and wanted to meet her outside the jail. (PSMF ¶ 92). Newcomb was terminated as a result. (Docket 81, Ex. 22 at 2). In October 1995, inmate Clarissa Parks claimed CO Merle Thompson would stop to watch her while she used the toilet. (Docket 81, Ex. 23 at 2). The supervisor felt the complaint was unwarranted, but that the complaint should be addressed and kept on the record due to conflicting statements about the incident. (*Id.*).

Kahle filed this lawsuit, alleging violations of her constitutional rights, assault and battery, negligence, and intentional infliction of emotional distress. (Docket 63-amended complaint). Defendants Malone, Holloway, Schuft, the PCSD, and the Jail (the County Defendants) have moved for summary judgment. Defendant Leonard also has moved for summary judgment, to dismiss pendent state law claims, and for partial judgment on the pleadings.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. *Id.; Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, the court views the evidence presented based upon which party has the burden of proof under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

DISCUSSION

I. Failure to Exhaust Administrative Remedies

Defendants argue Kahle's claims should be dismissed due to her failure to exhaust administrative remedies as required under the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(a). "The PLRA exhaustion requirement is an affirmative defense under Fed. R. Civ. P. 8(c)." *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001). "It is the

burden of the defendant asserting this affirmative defense to plead and prove it." *Id.* The Jail provides procedures for redress of prisoner grievances related to their confinement. Kahle did not file a grievance with the Jail before filing the instant lawsuit. But Kahle did file four inmate requests to which, she contends, the PCSD did not respond. Kahle argues that this failure to respond eliminated the availability of further administrative proceedings. Viewed in the light most favorable to Kahle, the record is not clear as to whether she exhausted her administrative remedies. Based on the current state of the record, the court concludes defendants have not met their burden of proving Kahle failed to exhaust her administrative remedies and denies defendants' motions based on failure to exhaust.

II. Pennington County Sheriff's Department and the Jail

PCSD and the Jail argue they are not entities that may be sued. The capacity to be sued is determined by the law of the state in which the district court is located. Fed. R. Civ. P. 17(b). Under South Dakota law, jails are established by authority of the board of county commissioners and are operated at county expense. *See* SDCL 24-11-2. A county sheriff has charge of the jail in his county. *See* SDCL 24-11-13. "County jails are not legal entities amenable to suit." *Owens v. Scott County Jail,* 328 F.3d 1026, 1026 (8th Cir. 2003). A sheriffs department "is not a legal entity and, therefore, is not subject to suit or liability under section 1983." *Dean v. Barber,* 951 F.2d 1210, 1214 (11th Cir. 1992).[4] The court concludes the PCSD and Jail are not proper

[4] The Eighth Circuit has cited Dean with approval in at least two unpublished opinions that do not carry precedential value. *Estate of Wade v. Tompkins,* 73 Fed. Appx. 890, 893, 2003 WL

party defendants because they are not legal entities that may be sued, and the claims against them must be dismissed.[5]

III. Official Capacity Claims

Holloway, Schuft, and Malone argue they are entitled to summary judgment on Kahle's claims against them in their official capacities. Kahle's complaint names the individual defendants in both their individual and official capacities. "Suits against public employees in their official capacity are the legal equivalent of suits against the governmental entity itself." *Bankhead v. Knickrehm,* 360 F.3d 839, 844 (8th Cir. 2004). Accordingly, the court will treat the claims against the individual defendants in their official capacities as claims against Pennington County.

"A plaintiff may establish municipal liability under § 1983 by proving that his or her constitutional rights were violated by an 'action pursuant to official municipal policy' or misconduct so pervasive among non-policymaking employees of the municipality 'as to constitute a "custom or usage" with the force of law.'" *Ware v. Jackson County, Mo.,* 150 F.3d 873, 880 (8th Cir. 1998)(quoting *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)(internal quotations omitted)). "Official policy involves 'a deliberate choice to follow a course of action . . . made

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22053145 (8th Cir. Aug 04, 2003) (unpublished per curiam); *De La Garza v. Kandiyohi County Jail,* 18 Fed. Appx. 436, 437, 2001 WL 987542 (8th Cir. Aug 30, 2001)(unpublished per curiam).

[5] The court further notes that the conclusion that PCSD and the Jail may not be sued matters little, for the claims against the individual defendants in their official capacities are the legal equivalents of claims against Pennington County, as explained below.

from among various alternatives' by an official who has the final authority to establish governmental policy." *Jane Doe A v. Special Sch. Dist. of St. Louis County,* 901 F.2d 642, 645 (8th Cir. 1990) (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)). Alternatively, "custom or usage" is shown by:

> (1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
>
> (2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
>
> (3) The plaintiff['s] injury by acts pursuant to the governmental entity's custom, i.e., [proof] that the custom was the moving force behind the constitutional violation.

Id. at 646 "[A] municipality cannot be held liable *solely* because it employs a tortfeasor—or in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell,* 436 U.S. at 691.

Kahle has not claimed her constitutional rights were violated due to an official Pennington County policy. Further, Kahle's memorandum opposing summary judgment addresses the above-listed elements of a "custom or usage" claim. Thus, the court must determine whether Kahle has presented evidence from which a jury could find the existence of a "custom or usage."

As noted above, proving "custom or usage" requires three elements be met. First, Kahle must present evidence of the "existence of a continuing, widespread, persistent pattern of unconstitutional misconduct" by Pennington County employees. Although Kahle cites Holloway's deposition, wherein he confirmed his concern that problems were occurring too much at the Jail (Holloway Dep. 51:22-24), this statement is insufficient to show a widespread pattern of unconstitutional misconduct. Kahle also cites evidence "detailing the multitude of incidents where Jail staff was engaging in sexual misconduct with inmates to conclude a persistent pattern exists." (Kahle Br. at 14). As County Defendants point out, however, four of those incidents occurred after the events forming the basis of Kahle's complaint in this matter. This evidence cannot be used to demonstrate a pattern of unconstitutional conduct; the custom or usage at issue here relates only to things Pennington County could have remedied before Kahle's sexual assault.

As to events occurring before the sexual assault in this case, Kahle presents the following evidence: (1) two inmates complained that a CO made sexual remarks to them and looked into Kahle's cell; (2) in 1999, a CO sexually assaulted a female inmate; (3) in 1999, a female CO questioned a female inmate about her sexual orientation and asked to meet the inmate outside the jail; and (4) in 1995, an inmate complained about a CO who would watch her use the toilet. On the first, third, and fourth occasions, the incidents were investigated and corrective action was taken. The CO in the first incident received counseling. The CO in the third incident was fired. The CO involved in the fourth incident was not fired because the allegations were found to be unwarranted. The second incident is the only prior incident of sexual assault of an inmate. In that incident, the offending CO's employment was terminated, and the CO was

prosecuted for the offense. "Liability for an unconstitutional custom or usage, however, cannot arise from a single act." *McGautha v. Jackson County, Mo.*, 36 F.3d 53, 57 (8th Cir. 1994). Also, Leonard never had been involved in a sexual assault of an inmate, so County Defendants had no notice he would commit such an act.

In *Andrews v. Fowler*, 98 F.3d 1069, 1075-76 (8th Cir. 1996), the Eighth Circuit affirmed the district court's ruling that the plaintiff had failed to demonstrate the defendant, city had a policy or custom of failing to investigate or act on complaints of sexual abuse by police officers. The court ruled that "two specific prior complaints against [an officer] and the various rumors that do not implicate a particular officer pale in comparison to the type of prior complaints that we have previously held supported a verdict against a city." *Id.* at 1076. In *Andrews*, before the incidents surrounding that case, three officers with the North Sioux City Police Department previously were asked to resign based on "their relations with minor females in the community." *Id.* at 1075. In each of those prior instances, however, the mayor and city council had taken immediate action in asking for resignations upon learning about the officer's misconduct. *Id.* The Eighth Circuit ruled that, contrary to the plaintiff's arguments, these instances were strong evidence showing "the city had a policy or custom of taking adequate remedial action to remove police officers accused of sexual misconduct with minors." *Id.* The court also concluded that the city similarly had acted to request the officer's resignation upon learning of the officer's misconduct. *Id.* The "two instances of misconduct indicate that [the police chief] was aware that some problem existed with [the officer], but they do not indicate a 'persistent and widespread' pattern of misconduct that amounts to a city custom or policy of overlooking police misconduct." *Id.* at 1076 (quoting *Monell*, 436 U.S. at 694).

The evidence in the present case is less than that presented in Andrews. In this case, the evidence shows only four relevant incidents of misconduct occurred before Kahle's sexual assault. In all four cases, an investigation was conducted. In two of the cases, a CO was terminated. Only one of those incidents involved a sexual assault of an inmate. In sum, no evidence has been presented to show a persistent and widespread pattern of misconduct amounting to a county custom or policy of overlooking misconduct by COs.

Even assuming Kahle were able to establish a widespread, persistent pattern of unconstitutional misconduct, her claim would fail because she has not presented evidence to meet the second element necessary to prove her claim against Pennington County—a deliberate indifference to or tacit authorization of this conduct by Pennington County officials after receiving notice of the misconduct. *See Jane Doe A*, 901 F.2d at 646. Leonard's employment was terminated after the sexual assault that occurred in this case. The evidence shows county officials investigated allegations of sexual misconduct at the jail. Pennington County had in place policies to prevent sexual assaults and other sexual misconduct from occurring. Kahle has not presented evidence to show Pennington County was deliberately indifferent to or tacitly authorized the misconduct that occurred in this case. Furthermore, because Kahle is unable to meet the first two elements of her claim, she also is unable to show Pennington County's custom was the moving force behind her assault by Leonard, the third element of her claim. Accordingly, summary judgment is granted in favor of Pennington County on Kahle's official capacity claims.

IV. Individual Capacity Claims

Holloway, Schuft, and Malone also seek summary judgment on Kahle's claims against them in their individual capacities. Due to the similarity of the arguments regarding Holloway and Schuft, the court will address them simultaneously, and it will address Malone's arguments separately.

A. Holloway and Schuft

Holloway and Schuft argue they are entitled to summary judgment on Kahle's claims against them based on their hiring of Leonard, Leonard's training, or their supervision of Leonard. Supervisors may not be held liable for Eighth Amendment claims brought under § 1983 strictly on a respondeat superior theory. *Choate v. Lockhart,* 7 F.3d 1370, 1376 (8th Cir. 1993). Under Eighth Circuit precedent, Holloway and Schuft may be individually liable under § 1983 as supervisors for "failing to adequately receive, investigate, or act upon complaints of sexual misconduct by [jail] employees." *Andrews,* 98 F.3d at 1078. To hold supervisors liable, a plaintiff must show they:

> (1) Received notice of a pattern of unconstitutional acts committed by subordinates;
>
> (2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts;
>
> (3) Failed to take sufficient remedial action; and
>
> (4) That such failure proximately caused injury to the [plaintiff].

Jane Doe A, 901 F.2d at 645. Also, supervisors may be held individually liable if they "directly participate[] in the constitutional violation," or if their "failure to train or supervise the offending actor caused the deprivation." *Tilson v. Forrest City Police Dep't,* 28 F.3d 802, 806 (8th Cir. 1994). "The standard of liability for a failure to train . . . is deliberate indifference." *Id.* at 807. "The standard of liability for failure to supervise is 'demonstrated deliberate indifference or tacit authorization of the offensive acts.'" *Id.* (quoting *Bolin v. Black,* 875 F.2d 1343, 1347 (8th Cir. 1989)). "This requires a showing that the supervisor had notice that the training procedures and supervision were inadequate and likely to result in a constitutional violation." *Andrews,* 98 F.3d at 1078.

In order to hold Holloway and Schuft liable for their failure to adequately receive, investigate, or act on complaints of sexual misconduct, Kahle must first present evidence that Holloway and Schuft received notice of a pattern of unconstitutional acts committed by subordinates. As noted above with regard to Pennington County, the evidence presented does not demonstrate a persistent and widespread pattern of misconduct, which is necessary to hold Pennington County liable for a municipal policy or custom. The court must separately address, however, whether the evidence is sufficient to show that Holloway and Schuft individually were aware of such a pattern. *See id.* Unlike the situation in *Andrews,* where Price was aware of prior complaints against Fowler, in this case, Holloway and Schuft had not received complaints regarding Leonard. Nor were they on notice of a pattern based on other incidents at the Jail. Only one other sexual assault had occurred at the Jail before the incident involving Kahle, and that incident was fully investigated, resulting in the termination and prosecution of the CO. Kahle has failed to present evidence that Holloway and Schuft had

notice of a pattern of unconstitutional acts committed by subordinates.

Even assuming Holloway and Schuft were on notice of such a pattern, Kahle has not presented evidence that they were deliberately indifferent to or tacitly authorized the conduct. Although the Policy Manual did not inform officers it was a felony to have sexual contact with inmates, and although the Jail did not have video cameras in it, these facts, taken in the light most favorable to Kahle, do not demonstrate deliberate indifference or tacit authorization. All applicants for CO positions were subjected to a thorough background investigation, and the report of the investigation performed on Leonard did not disclose information that would have alerted Holloway and Schuft to the potential that Leonard would conduct himself as he did. Leonard did not have a criminal history that would have disqualified him from employment as a CO. A psychological examination did not reveal anything that would disqualify Leonard. After the incident at issue, Leonard was terminated from employment and prosecuted, as was Donovan, the offender in the other sexual assault at the Jail. Kahle has not presented evidence sufficient to demonstrate Holloway and Schuft were deliberately indifferent to or tacitly authorized Leonard's assault of Kahle.

Further, assuming Kahle had presented evidence of deliberate indifference or tacit authorization, she has not shown that Holloway and Schuft failed to take remedial action. After the prior incidents of sexual misconduct, investigations were conducted and punishments handed down, including termination of two offending employees and counseling for another. Leonard similarly was terminated. Kahle has not presented sufficient evidence to show Holloway and Schuft failed to take sufficient remedial action.

Alternatively, supervisors also may be held individually liable if their "failure to train or supervise the offending actor caused the deprivation." *Tilson,* 28 F.3d at 806. The standard of liability for a failure to train is deliberate indifference, while the standard for failure to supervise is deliberate indifference or tacit authorization of the offensive acts. *Id.* "This requires a showing that the supervisor had notice that the training procedures and supervision were inadequate and likely to result in a constitutional violation." *Andrews,* 98 F.3d at 1078. As discussed above, Holloway and Schuft were not deliberately indifferent to and did not tacitly authorize sexual assaults at the Jail. Further, nothing in the record shows these two defendants had notice of inadequate training procedures and supervision that were likely to result in a constitutional violation. Thus, Holloway and Schuft are entitled to summary judgment on Kahle's claims against them in their individual capacities. Additionally, because these defendants are entitled to summary judgment in both their official and individual capacities, the issue of whether they are protected by qualified immunity is moot.

B. Malone

Malone argues he is entitled to summary judgment on Kahle's claims against him in his individual capacity for several reasons. First, Malone argues he was not involved personally in any conduct that allegedly violated Kahle's constitutional rights. Second, under Kahle's failure to supervise theory, Malone contends he was not deliberately indifferent. Third, Malone asserts he is entitled to qualified immunity because Kahle's allegations do not state a constitutional violation and the law in existence on December 14, 2002, did not give Malone fair notice that his conduct would violate Kahle's constitutional rights.

1. Qualified Immunity

The court will address Malone's qualified immunity argument first. "Qualified immunity shields government officials from suit unless their conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." *Liebe v. Norton,* 157 F.3d 574, 577 (8th Cir. 1998)(citation omitted). "To withstand the application of qualified immunity, a plaintiff must assert a violation of a constitutional or statutory right; that right must have been clearly established at the time of the violation; and, given the facts most favorable to the plaintiff, there must be no genuine issues of material fact as to whether a reasonable official would have known that the alleged action indeed violated that right." *Id.*

It is "well-established" that "failing to protect inmates from a foreseeable attack violates the Eighth Amendment when an official is 'deliberately indifferent to a substantial risk of serious harm."' *Lawrence v. Bowersox,* 297 F.3d 727, 732 (8th Cir. 2002)(quoting *Estate of Davis by Ostenfeld v. Delo,* 115 F.3d 1388, 1395 (8th Cir. 1997)). Also, "an inmate has a constitutional right to be held in a safe prison cell." *Wayland v. City of Springdale, Ark.*, 933 F.2d 668, 671 (8th Cir. 1991). Finally, a reasonable official would have known that failing to protect an inmate from sexual assault would violate those rights. This Eighth Amendment right was clearly established prior to December 14, 2002. Thus, Malone is not entitled to qualified immunity.

2. Failure to Supervise

Supervisors may be held individually liable if their "failure to train or supervise the offending actor caused the deprivation." *Tilson,* 28 F.3d at 806. "The standard of

liability for failure to supervise is 'demonstrated deliberate indifference or tacit authorization of the offensive acts."' *Id.* at 807 (quoting *Bolin,* 875 F.2d at 1347). "This requires a showing that the supervisor had notice that the training procedures and supervision were inadequate and likely to result in a constitutional violation." *Andrews,* 98 F.3d at 1078.

A question of fact exists as to whether Malone, as Leonard's supervisor, demonstrated deliberate indifference to the sexual assault. On the night in question, Malone was responsible for supervising Leonard, who was still a trainee. (PSMF ¶ 6). Malone was on the cell block to observe Leonard and ensure that he did not do anything inappropriate. (*Id.* ¶ 9). Malone was also in charge of making sure that lockdown was performed correctly. (*Id.* ¶ 14). Pursuant to Jail policy, the supervisor was required to record in the shift log each time an inmate's door is opened after lockdown. (Policy Manual 300.04). It is undisputed that Leonard went into Kahle's cell three times that night, but the shift log does not reflect that her cell doors were opened after lockdown. (PSMF ¶ 23). When the cell doors are opened, the panel lights change color from green to red. The panel lights were located on the work station where Malone was seated. Malone testified he did not notice the panel lights changing. Leonard testified he told Malone every time he went up to Kahle's cell. (PMSF ¶ 18). Malone claims he did not observe what occurred on the upper level of the cell block, where Kahle's cell was located, but Kahle testified in her deposition that she saw Malone look up when Leonard was at Kahle's cell. (Docket 81-Kahle Dep. at 37:13-16, 121:8-13). After considering the evidence in the light most favorable to Kahle, the court concludes a genuine issue of material fact remains as to whether Malone was deliberately indifferent to the

sexual assault committed on Kahle. Thus, Malone's motion for summary judgment is denied.

V. State Law Claims

County Defendants move for summary judgment on Kahle's negligence claim, contained in the Third Count, based on statutory immunity. Leonard moves for partial judgment on the pleadings on this claim. As to the County Defendants, Kahle concedes "that Defendants are statutorily immune from this claim," and she "withdraws the Third Count of her Complaint alleging Defendants Holloway and Schuft were negligent." Kahle's concession is somewhat ambiguous, however, and her brief appears only to expressly address the arguments by Holloway and Schuft. To the extent Kahle's brief does not address Malone, the court concludes that Malone is entitled to summary judgment on the negligence claim. *See Webb v. Lawrence County,* 144 F.3d 1131, 1139-40 (8th Cir. 1998); SDCL 3-21-8, -9.

Kahle does not object to Leonard's motion for partial summary judgment, conceding that the negligence claims for "failure to adequately supervise, monitor, and train" Jail employees "do not pertain to Defendant Leonard." Thus, all defendants are granted summary judgment on the Third Count of the amended complaint.

VI. Jermaine Leonard

A. Motion for Summary Judgment

Leonard argues he is entitled to summary judgment on the First and Fourth Counts of the amended complaint because Kahle did not suffer a physical injury, which is required before a prisoner may bring a federal claim for emotional or

mental injury. Leonard contends that nowhere in her amended complaint does Kahle allege a physical injury or even allege treatment for physical injuries.

Under the PLRA, "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). In enacting § 1997e(e), the Eighth Circuit has noted, Congress used "unmistakably clear language," evincing its intent to "limit[] recovery for mental or emotional injury in all federal actions brought by prisoners." *Royal v. Kautzky,* 375 F.3d 720, 723 (8th Cir. 2004).

Section 1997e(e) does not define "physical injury," however, and the Eighth Circuit has not published an opinion on what constitutes "physical injury." The Second Circuit, however, has addressed the issue. In *Liner v. Goord,* 196 F.3d 132, 135 (2d Cir. 1999), the court reversed the district court's dismissal under section 1997e(e), holding the plaintiffs "alleged sexual assaults qualified as physical injuries as a matter of common sense." The court also observed that "sexual assaults would constitute more than *de minimis* injury." *Id.* (citing *Siglar v. Hightower,* 112 F.3d 191, 193 (5th Cir. 1997) (holding that the physical injury necessary to support a claim for mental or emotional suffering "must be more than *de minimus* [sic], but need not be significant")). In an unpublished opinion, the Eighth Circuit reached a similar conclusion in *Williams v. Prudden,* 67 Fed. Appx. 976, 978, 2003 WL 21135681 (8th Cir. May 19, 2003)(unpublished). Citing *Liner*, the court held that the plaintiff had "sufficiently state[d] an Eighth Amendment claim," including resulting emotional and bodily harm, "by alleging that [a CO] forcibly ground his pelvis against her, grabbed her breast, verbally

demanded sexual favors, made physical sexual advances, and attempted to force himself upon her." *Id.*

The court notes that both *Liner* and *Williams* appear to have involved at least some other demonstrable physical injury. *See Liner,* 196 F.3d at 133 (stating COs had "slammed appellant's head into a cabinet, struck his face, and taunted him with racial slurs," although this conduct was unrelated to the plaintiffs emotional distress claim with respect to sexual assault); *Williams,* 67 Fed. Appx. at 977 (stating plaintiff "suffered resulting bodily and emotional harm"). But the Second Circuit's conclusion in *Liner* does not reference the potential physical injury the plaintiff may have incurred in an incident unrelated to the emotional distress claim. *See Liner,* 196 F.3d at 135. Further, the Eighth Circuit's ruling in *Williams* cites the *Liner* court's holding that a sexual assault qualifies as a physical injury as a matter of common sense, without distinguishing that holding from the case before the court, in which bodily harm had occurred. While mindful that the law on this issue is not clearly defined within the Eighth Circuit, the court finds persuasive the Second Circuit's opinion, as well as the Eighth Circuit's unpublished opinion. Kahle has presented evidence to support her claim that she was sexually assaulted by Leonard. This sexual assault included penile, digital, and oral touching, as well as penetration of, her vaginal area. Thus, Kahle, by presenting evidence that she was sexually assaulted, has shown she suffered a physical injury. Accordingly, Leonard's motion for summary judgment on this issue is denied.

B. Motion to Dismiss

Leonard next argues the pendent state law claims against him should be dismissed because "they are barred by the sovereign immunity afforded by SDCL 3-21-8 and 3-21-

9(5)."[6] Under SDCL 3-21-8, "no person, political subdivision or the state is liable for failure to provide a prison, jail or penal or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel, programs, facilities or services in a prison or other correctional facility." SDCL 3-21-9(5) provides in part that "no person, political subdivision or the state is liable . . . for any injury caused by or resulting from . . . (5) services or programs administered by or on behalf of the prison, jail or correctional facility."

In *Webb,* the plaintiff sued Lawrence County and its sheriff for a sexual assault at the hands of the plaintiffs cellmate. *Webb,* 144 F.3d at 1133-34. The Eighth Circuit held that the defendants were entitled to statutory immunity on the plaintiffs *negligence* claim, noting the plaintiff had not "claim[ed] that defendants acted intentionally, were not acting within the scope of their authority or performing county functions, or were performing merely ministerial acts." *Id.* at 1139-41.

In reviewing a case under Arkansas law, the Eighth Circuit has observed that "[a] public official is subject to suit for the commission of an intentional tort, or for actions taken when the official is not performing a county function." *Davis v. Fulton County, Ark.,* 90 F.3d 1346, 1353 (8th Cir.

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[6] As Kahle points out in her brief opposing summary judgment, the immunity provided by these statutes commonly is referred to as "statutory immunity" rather than sovereign immunity. To the extent Leonard moves for dismissal based on sovereign immunity, the motion must be denied because Pennington County waived such immunity by purchasing liability insurance from the South Dakota Public Assurance Alliance. *See Webb v. Lawrence County,* 144 F.3d 1131, 1139 (8th Cir. 1998); SDCL 21-32A-1, -2.

1996)(internal citations omitted). In analyzing a plaintiffs claims against a school district official, the South Dakota Supreme Court reviewed statutes that provided immunity to state officials acting within the scope of their employment, regardless of whether such acts are ministerial or discretionary. *Bego v. Gordon,* 407 N.W.2d 801, 808 (S.D. 1987) (citing SDCL 21-32-17; 21-32A-2). The court opined that "[a] school district official who commits an intentional tort or acts ultra vires exceeds the scope of his official authority and will not be shielded by immunity." *Id.* The court also noted that public employees usually have immunity from liability for injuries resulting from erroneous or mistaken decisions, provided the acts are done within the scope of the officer's authority. *Id.* at 808 n.10. Thus, the court concluded, the officer is not liable for an exercise of discretion, except in cases involving, among other things, intentional torts. *Id.*; *see also Swedlund v. Foster,* 2003 SD 8, 657 N.W.2d 39, 46 (S.D. 2003) (citing *Bego* and *Webb*, and ruling that "sovereign immunity is not a defense to a claim under 42 U.S.C. § 1983 because civil rights violations claim an intentional tort.").

The claims in the Second and Fourth Counts of Kahle's amended complaint allege intentional torts committed by Leonard. The South Dakota Supreme Court has not addressed whether SDCL 3-21-8 and -9(5) provide immunity from claims based on intentional torts. The South Dakota Supreme Court's rulings in other similar contexts and Eighth Circuit case law persuades the court that no immunity is available to Leonard for intentional tort claims. Leonard's motion to dismiss is denied. Based on the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendants Pennington County Sheriff Don Holloway, Pennington County Jail Supervisor Scott Schuft, the

Pennington County Sheriffs Department, and the Pennington County Jail (Docket 47) is granted.

IT IS FURTHER ORDERED that the motion for summary judgment by Deputy Tim Malone (Docket 47) is granted in part and denied in part.

IT IS FURTHER ORDERED that Leonard's motion for summary judgment (Docket 54) is denied.

IT IS FURTHER ORDERED that Leonard's motion to dismiss (Docket 57) is denied.

IT IS FURTHER ORDERED that Leonard's motion for partial judgment on the pleadings (Docket 59) is granted.

Dated May 26, 2006.

BY THE COURT:

/s/ KAREN E. SCHREIER

CHIEF JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-2485

[Filed September 5, 2006]

MINDY KAHLE,
Plaintiff-Appellee,

v.

JERMAINE LEONARD, individually and in his official capacity,
Defendant,

DEPUTY TIM MALONE, individually and in his official capacity,
Defendant-Appellant,

SHERIFF DON HOLLOWAY, individually and in his official capacity; PENNINGTON COUNTY SHERIFF'S OFFICE; PENNINGTON COUNTY JAIL; SCOTT SCHUFT, individually and in his official capacity,
Defendants.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

APPELLANT TIM MALONE'S REPLY BRIEF

Mr. Donald P. Knudsen and
Mr. James S. Nelson
Gunderson, Palmer, Goodsell
& Nelson, LLP
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
Attorneys for Deputy Tim Malone

* * *

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official's] perspective at the time in question, not with hindsight's perfect vision." *Id.*

I. *Kahle Was Not Incarcerated Under Conditions Posing a Substantial Risk of Serious Harm*

Malone argued that the facts which the district court deemed adequately supported for summary judgment purposes did not state the violation of Kahle's constitutional rights. Appellant's Brief p. 25. The evidence simply would not support a finding that Malone was subjectively aware that Leonard was having sex with Kahle and, having such knowledge, Malone facilitated it, approved it, condoned it, or turned a blind eye to it. *Id.*, citing *Boyd v. Knox*, 47 F.3d

966, 968 (8th Cir. 1995) and *Ripson v. Alles,* 21 F.3d 805, 809 (8th Cir. 1994).

In response, Kahle contends that she need not prove Malone actually knew Leonard was having sexual relations with Kahle; rather, she need only prove that Malone was aware of a *substantial risk* that Leonard would have sexual relations with Kahle. Appellee's Brief pp. 19-20.

To state an Eighth Amendment failure-to-protect claim, it is not sufficient for a plaintiff to merely allege that a risk existed; rather, the plaintiff must point to facts in the record demonstrating that a

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substantial or *excessive* risk exists. *Farmer,* 511 U.S. at 834, 114 S.Ct. at 1977.

In *Jensen v. Clarke,* 94 F.3d 1191 (8th Cir. 1996) the Eighth Circuit examined the issue of whether a risk of harm was substantial in a class action case brought by Nebraska State Prison inmates. The inmates contended that the prison's practice of randomly assigning inmates to double cells subjected them to a substantial risk of assault at the hands of their cellmates. *Id.* at 1198-1199. The record in that case included evidence that showed a dramatic increase in the amount of inmate violence. In addition, there had been a dramatic increase in the number of inmates requesting protective custody, and those increases correlated with the time that increases were made in the number of prisoners being double-celled. *Id.* at 1198.

The district court found that these statistics compelled a finding that inmates in the double cells faced a substantial risk

of assault at the hands of their cellmates. *Id.* The Eighth Circuit affirmed that finding. *Id.*

In this case, there is no evidence in the record which would support a finding that Kahle was exposed to a substantial risk that she would be

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subjected to sexual assault. The district court in this case analyzed the record to determine whether there was evidence of previous similar incidents prior to the incident involving Leonard and Kahle. Appellant's Brief ADD. pp. 6-7, 12-15. The court noted only one prior sexual assault and also found officials had taken appropriate corrective action in response. *Id.* at 13. Specifically, as to Leonard the court stated: **"Also, Leonard never had been involved in a sexual assault of an inmate, so county defendants had no notice he would commit such an act."** *Id.* at 13 (emphasis added).

The facts which the district court found sufficiently established for purposes of summary judgment analysis simply do not establish that Kahle was exposed to a substantial risk that she would be sexually assaulted by a correctional officer. Establishing that she was exposed to a substantial risk of serious harm is an essential element of her claim. *Farmer,* 511 U.S. at 834, 1114 S.Ct. at 977 ("For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."). Because there is no evidence in the record which creates a genuine issue for trial on an essential element of Kahle's

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claim, she has failed to allege the violation of her constitutional rights. *See Behrens*, 516 U.S. at 309, 116 S.Ct. at 840 (on summary judgment, the court must view the evidence before it when conducting the immunity inquiry). Because there is no genuine issue as to whether Kahle's constitutional rights were violated, Malone is shielded from liability under principles of qualified immunity. *Prater v. Dahm,* 89 F.3d 538, 542 (8th Cir. 1996).

II. Malone Was Not Deliberately Indifferent

Alternatively, if the record would support a finding that Kahle was exposed to a substantial risk of serious harm, Malone is nevertheless immune from Kahle's claims because he was not deliberately indifferent to that risk.

The subjective component of a conditions-of-confinement requires the plaintiff to show the jail official was both aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and that the official actually drew that inference. *Farmer,* 511 U.S. at 837, 114 S.Ct. at 1979; *Crow,* 403 F.3d at 602.

Deliberate indifference describes a state of mind more blameworthy than simple negligence and even beyond gross negligence. *Farmer,* 511

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-2485

[Filed February 24, 2007]

MINDY KAHLE,
Plaintiff-Appellee,

v.

JERMAINE LEONARD, individually and in his official capacity,
Defendant,

DEPUTY TIM MALONE, individually and in his official capacity,
Defendant-Appellant,

SHERIFF DON HOLLOWAY, individually and in his official capacity; PENNINGTON COUNTY SHERIFF'S OFFICE; PENNINGTON COUNTY JAIL; SCOTT SCHUFT, individually and in his official capacity,
Defendants.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA,
WESTERN DIVISION

PETITION FOR REHEARING EN BANC
FOR DEPUTY TIM MALONE

Mr. Donald P. Knudsen and
Mr. James S. Nelson
Gunderson, Palmer, Goodsell
& Nelson, LLP
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078

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Supreme Court and the United States Court of Appeals for the Eighth Circuit in all but the most extreme types of cases. Reply Brief pp. 23-33.

The panel adopted the district court's statement that facts in the record could permit a jury to find Malone was aware of a substantial risk of harm. *Kahle v. Leonard*, __ F.3d __, __, 2007 WL 438769 *5 (8th Cir. 2007). The panel recognized that Malone claims he did not subjectively infer the existence of a substantial risk to Kahle; however, the panel said that knowledge of the risk could be inferred from the fact the risk is obvious. *Id.* at *6. The panel affirmed denial of qualified immunity to Malone.

ARGUMENT AND AUTHORITIES

I. The Panel did not Address the Objective Component of Kahle's Claim

A prison official violates the Eighth Amendment only when two requirements are met: First, the deprivation alleged must be objectively sufficiently serious (the objective component). *Farmer*, 511 U.S. at 834. This means that the prison official's conduct must result in the denial of the minimal civilized measure of life's necessities. *Id.* In a failure-to-protect case, this rule requires the inmate to show that she is

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incarcerated under conditions posing "a substantial risk of serious harm." *Id.*[1]

To satisfy the objective component of an Eighth Amendment claim, the plaintiff must allege not only that she suffered a serious harm, but also that there was a substantial risk beforehand that the serious harm might actually occur. *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005).

As the panel noted Malone does not dispute that sexual assault is a serious harm. 2007 WL 438769 *4. However, Malone did argue that there was not a substantial risk beforehand that Kahle (or any other inmate) would be sexually

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[1] The second requirement (subjective component) for an Eighth Amendment claim requires the inmate to prove that the official had a [p.7] subjectively sufficiently culpable state of mind -- deliberate indifference to inmate health or safety. *Farmer*, 511 U.S. at 834.

assaulted by Leonard (or any other correctional officer). Reply Brief pp. 17-20. **The panel's decision makes no mention whatsoever of Malone's argument.**

In *Farmer,* the U.S. Supreme Court expressly recognized that the issue of at what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes was not before it and was not addressed in its opinion. *Farmer,* 511 U.S. at 834 n. 3. The Seventh Circuit recently noted that there is a dearth of case law on that topic.

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Brown, 398 F.3d at 911. The Ninth Circuit made a similar observation in *Estate of Ford v. Ramirez-Palmer,* 301 F.3d 1043, 1051 (9th Cir. 2002).

The question raised in this appeal - - at what point a risk of harm becomes sufficiently substantial for Eighth Amendment purposes - - presents a question of exceptional importance. If case law on that issue is not clearly established, then Malone is entitled to summary judgment on grounds of qualified immunity. See *Estate of Ford,* 201 F.3d at 1051. For that reason, rehearing en banc should be granted in this case to address this important issue.

II. The Panel's Opinion Conflicts with Authoritative Opinions from the Tenth Circuit

The panel's opinion in this case is contrary to two published opinions from the United States Court of Appeals for the Tenth Circuit.

A. Barney v. Pulsipher, 143 F.3d 1299 (10th Cir. 1998)

Contrary to jail policies, on two separate occasions a male guard (Pulsipher) removed female inmates from their cells and escorted them to an unmonitored area in the jail where he sexually assaulted them.

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Extensive pre-employment background checks disclosed nothing that indicated Pulsipher was unfit for duty and nothing in the record indicated Pulsipher posed a risk to inmates. *Id.* at 1304-05.

The district court granted the sheriff and county commissioners summary judgment finding them immune from suit on grounds they had not been deliberately indifferent to a risk of assault. The lack of any prior incidents by Pulsipher or other jailers did not put them on notice of a substantial risk of harm to inmates. *Id.* at 1306.

The plaintiff argued that the defendants' subjective knowledge of the risk was established by the fact that the jail had adopted policies requiring two jailers to be present when female prisoners were removed from their cells. This, they claimed, reflected the defendants' understanding that there was a substantial risk to female inmates of sexual misconduct when only one male jailer was present. *Id.* at 1310-1311. The Tenth Circuit rejected that argument:

> [W]e decline to find knowledge...of a substantial risk of harm from the mere fact of Mr. Pulsipher's gender. Without any evidence of sexual misconduct in Mr. Pulsipher's background or any evidence of previous incidents of sexual misconduct by...jailers, plaintiffs

> have failed to raise a fact question on whether the Sheriff and the Commissioners acted with deliberate
>
> [p.9]
>
> indifference under either an objective or subjective standard.

Id. at 1311.

***B. Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993)**

The *Hovater* decision bears some striking similarities to this case.

Robinson was certified as eligible for employment at a jail in Kansas. He received proper training and was given high performance evaluations by his supervisors during his employment. Prior to the incidents at issue in this case, there were no complaints of sexual misconduct by Robinson or any other jailers. *Id.* at 1064.

Jail policies were in place designed to minimize situations where unsupervised male guards would be alone with female inmates. *Id.* at 1065.

A combination chapel/library was located on the third floor of the jail. On several occasions over a two day period Robinson called Hovater to the third floor purportedly to work in the library. Hovater claimed Robinson sexually propositioned her and on one occasion forcibly sodomized her. Hovater reported the incident and Robinson subsequently resigned. *Id.* at 1064-65.

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Hovater brought suit alleging, among other things, the sheriff failed to properly supervise Robinson. *Id.* The district court denied the sheriff's qualified immunity motion. The district court found that, although the sheriff did not have actual knowledge of Robinson's conduct, the sheriff had constructive knowledge of the risk of injury due to the fact that the sheriff was aware Robinson had unsupervised care and custody of female inmates. *Id.* at 1065-66. The sheriff appealed.

The Tenth Circuit noted that there is no constitutional requirement that jailers and inmates be of the same gender. The existence of policies against male guards having unsupervised care for female inmates was not evidence of an obvious risk that females left alone with male guards are likely to be assaulted. That was especially true in light of the fact that there was no prior indication that Robinson posed a threat to female inmates. *Id.* at 1066-68.

> To find a harm present in these circumstances would, in effect, require the conclusion that every male guard is a risk to the bodily integrity of a female inmate whenever the two are left alone. There is absolutely no evidence in this record to support that conclusion. **A constitutional violation may not be established by reliance on unsupported assumptions.**

Id. at 1068 (emphasis added).

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C. The Panel's decision conflicts with the Tenth Circuit precedents

The district court in this case found, as in the cases discussed above, there was no prior indication that Leonard or any other jailer at the Pennington County Jail posed any risk of assault to Kahle or any other inmate and that there was no persistent or widespread pattern of misconduct by jail officials. *Kahle v. Leonard,* United States District Court, District of South Dakota, Western Division, Civil No. 04-5024, Doc. No. 85 p. 3, 14-15.

The panel opinion in this case states that Malone's subjective knowledge of a risk of assault to Kahle could be inferred from the fact the risk is "obvious". 2007 WL 438769 *6. However, as the Tenth Circuit has found, the mere fact that Leonard was alone with Kahle, especially in light of the fact there was no prior indication that Malone had any propensity to assault inmates, does not make the risk of injury to Kahle "obvious." The fact the Eighth Circuit Opinion is contrary to the Tenth Circuit opinions indicates the law on this issue is not clearly established and Malone would therefore be entitled to qualified immunity. This presents an important question for rehearing en banc.

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III. The Panel Opinion conflicts with precedents from the Supreme Court of the United States and the Eighth Circuit

Malone denies having any subjective knowledge of a substantial risk of harm to Kahle. The panel opinion

acknowledges that Malone cannot be charged with inferences he did not draw; however the panel goes on to state that subjective knowledge of a risk can be inferred from the fact that a risk is obvious. 2007 WL 438769 *6. The panel's statement is in stark contradiction to the Supreme Court's decision in *Farmer v. Brennan,* 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) and Eighth Circuit precedents following *Farmer: Prater v. Dahm,* 89 F.3d 538 (8th Cir. 1996); *Boyd v. Knox,* 47 F.3d 966 (8th Cir. 1995).

The *Farmer* case defined the culpable state-of-mind requirement necessary to satisfy these subjective component of an Eighth Amendment conditions-of-confinement claim. It specifically discussed what it called the "crucial point (whether a prison official must know of a risk, or whether it suffices that he should know)[.]" *Id.* at 840. The court rejected the civil laws' standard for recklessness which would permit a finding of recklessness if a risk was obvious - - one that a reasonable person should have known. *Id.* at 837, 839-40, 841-42. Instead, the court adopted the criminal law standard for recklessness as

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the standard for deliberate indifference. *Id.* at 839-840, which permits a finding of recklessness only when a person disregards a risk of harm "**of which he is aware.**" *Id.* at 836-37 (emphasis added), 839-840, 841-42.

> [W]e cannot accept petitioner's argument that *Canton* compels the conclusion here that a prison official who was unaware of a substantial risk of harm to an inmate may nevertheless be held liable under the Eighth Amendment if the risk was obvious and a reasonable prison official would have noticed it.

Id. at 841-42. The requirement of actual subjective knowledge of a risk serves to isolate those who inflict "punishment" and to ensure that only the infliction of punishment carries liability under § 1983. *Id.* at 839, 841.

In seeming contradiction, the *Farmer* opinion also includes this statement:

> "[A] fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."

Id. at 842. This was the statement cited by the panel in this case as support for its statement that a jury in this case could find that Malone was subjectively aware of a risk of harm to Kahle based on the

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purportedly "obvious" evidence contained in the record. 2007 WL 438769 *6.

The panel's decision contradicts *Farmer* and Eighth Circuit precedents because it reduces the level of "obviousness" necessary to warrant an inference of subjective knowledge to the civil law standard of recklessness specifically rejected in *Farmer*. *Farmer* set forth an example of the type of evidence necessary to show that a risk of harm was so obvious that a prison official must have known of the risk. *Farmer,* 511 U.S. at 842-843. That example demonstrates that the risk of harm must be so obvious that the fact finder could draw but one conclusion - - the official actually had subjective knowledge of the risk despite the official's denial. Similarly, the Eighth Circuit has recognized that an inference of subjective knowledge based upon a risk's

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"obviousness" may only be permitted in "extreme" cases. *Prater v. Dahm,* 89 F.3d 538, 542 n. 2 (8th Cir. 1996); *Boyd v. Knox,* 47 F.3d 966, 968 n. 1. As the *Boyd* panel stated: "This is not such a case."

As the Tenth Circuit cases set forth above establish, a risk of sexual assault by a male jailer on a female inmate is not "obvious" simply due to the jailer's gender especially when the record contains no evidence

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that the jailer had any propensity to sexually assault inmates or that there was any widespread history of jailers assaulting inmates.

The discrepancy between the Tenth Circuit's precedents regarding the obviousness of the risk and the panel's decision in this case which is also contrary to Supreme Court and Eighth Circuit precedent establishes that the law was not clearly established as to **how obvious a risk of injury must be before a prison official may be subjected to liability.** Therefore, Malone is immune from suit under principles of qualified immunity.

The question of what quantity of obviousness is necessary in order to deny an official's claim to immunity is an important question which should be considered by the court en banc.

GUNDERSON, PALMER, GOODSELL
& NELSON, LLP

By:_____
James S. Nelson and

_____
Donald P. Knudsen
Attorneys for Deputy Tim Malone
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078